STEVEN HEW NGIN CHONG

v.

DATUK HJ. SHAHBUDDIN Y. K. CHENG & ANOR. AND ANOR. CASE

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[SUIT NO. KG. 454 OF 1987 & 186 OF 1986]
30 JUNE 1995

CONTRACT: *Consideration - Guarantee executed by plaintiffs and defendants as security for a loan to company - Plaintiffs shareholders of company - Shares sold to defendants on understanding that plaintiff be released from guarantee - Indemnity clause - Defendants to indemnify and keep plaintiffs indemnified against any claim by lender - Whether clause stands on its own - Whether there was consideration for the indemnity - Whether plaintiff entitled to be indemnified - Whether indemnity clause to be considered in the context of the whole agreement.*

CONTRACT: *Sale and purchase agreement - Interpretation of agreement - Intention of parties - Objective approach - Contra preferentum rule - Whether agreement to be read in favour of the plaintiffs.*

The plaintiffs, the 1st defendant and three others had on 9 October 1982 executed a letter of guarantee (the guarantee) in favour of Bank Bumiputra Malaysia Berhad (BBMB) as security for a sum loaned to Hoanbing (M) Sdn. Bhd. (Hoanbing) (later known Wisma Bersatu Sdn. Bhd. (Wisma Bersatu), a company controlled by and acting on behalf of the defendants. Later, the plaintiffs by a written agreement dated 18 May 1983 sold their shares in a company known as Metrocity Development Sdn. Bhd., which included all their shares held in Hoanbing, to the defendants for a sum of RM340,000. It was stated in clause 6 of the agreement that the sale and purchase shall be complete upon the execution of the deeds of transfers. Clause 10 of the agreement provided an undertaking by the purchaser for the rescission by the bank of the letter of guarantee dated 9 October 1982, or that the plaintiffs be released by the said bank in respect of the letter of guarantee or that the defendants be responsible for the said letter of guarantee and indemnify and keep the plaintiffs indemnified against all claims, actions or proceeding arising out of or relating to the said letter of guarantee.

Upon full payment of the purchase price, the plaintiffs transferred the shares to the defendants. The defendants then made several requests to BBMB for the withdrawal of the guarantees furnished by the plaintiffs but their requests were rejected. BBMB later instituted proceedings against the plaintiffs for sums outstanding, which proceedings were still pending in Court. The plaintiffs applied to the Court for a declaration that the plaintiffs be indemnified by the defendants against any claim by BBMB under the letter of guarantee and further or alternatively, an order that the defendants do within 30 days from the date of the order be made to set aside a fund out of which the plaintiffs' liability under the letter of guarantee could be met.

Counsel for the defendants contended that clause 10 was not supported by any consideration and that the agreement should be read in two parts. The first had been completed by the transfer of the shares of the plaintiffs in Metrocity to the defendants whereas the second part involved clause 10 which, standing on its own, without any consideration or any continuing enforceability clause or default provision, could no longer be enforced. Counsel for the defendants further submitted that the exact figure payable to BBMB was undetermined and that clause 10(c) referred to a figure whilst the two pending suits of BBMB stated a

different sum and that the plaintiffs had not made any payment under the said guarantee. It was contended by the Counsel for the plaintiffs that they were entitled to the declaratory order prayed for although they had not made any payment under the said agreement for several reasons, *inter alia*, that the defendants were contesting the actions on the basis that the undertaking to indemnify was without any consideration and that if the agreement was read as a whole the argument had no merit, and that they were entitled to relief in equity and further that s. 98 of the Contracts Act 1950 was applicable.

The issues for the Court to decide were (i) whether the agreement by the defendants to indemnify the plaintiffs against any claim by BBMB was supported by consideration, and that (ii) if the plaintiffs were entitled to be indemnified, whether they were at this stage entitled to the declaration prayed for.

Held:

[1] In order to arrive at the true interpretation of a document, a clause must be considered in the context of the whole of the document. An individual word takes its meaning from the context in which it is found and an individual clause takes its meaning from the context of the document in which it is found.

[2] In interpreting a contract, the mutual intention of the contracting parties should also be ascertained in the sense of what would have been the intention of hypothetical reasonable parties, placed in the same situation as the contracting parties, and contracting in the words used by the actual parties. The approach to be taken is an objective one.

[3] There is no reason to conclude that the said agreement should be construed in two parts. If that had been the intention of the parties then there would have been no necessity to include clause 10 in the said agreement since as early as 26 April 1983 the defendants had already written to BBMB to have the guarantee withdrawn. That course of action would have been continued if the defendant were only expected to act gratuitously.

[4] If the operative part of the document is unclear, then recitals may be relied upon as aid to construction. In view of the argument that clause 10 stood on its own, recital 3 should be considered. It is plain in that recital, that the intention of the parties when entering into the transaction, involved not only the payment of the purchase price for the shares but upon and subject to the terms and conditions provided therein. Clause 10 is a term or condition in the said agreement. Hence taking into account recital 3, it becomes clear that clause 10 is part and parcel of the said agreement read as a whole.

[5] In applying the rule of *contra preferentum*, the inevitable conclusion is that the defendants should be bound by it.

[6] The plaintiffs though once guarantors to the loan of Wisma Bersatu with BBMB, are no longer having any interest, directly or indirectly, in Wisma Bersatu. To say that the plaintiffs should pay first the outstanding debts under the said guarantee before their cause of action accrues would entail double losses to them and that would be unequitable, unfair and unjust.

[Declaration granted in terms prayed for; prayer for further or alternative order disallowed].

Cases referred to:

Chamber Colliery Ltd. v. Twyerould [1915] 1 Ch 268 ***(refd)***

Trengganu State Economic Development Corpn. v. Nadefinco Ltd. [1982] 1 MLJ 365 ***(refd)***

City Investment Sdn. Bhd. v. Koperasi Serbaguna Cuepacs Tanggungan Bhd. [1985] 1 MLJ 285 ***(refd)***

Reardon - Smith Line Ltd. v. Hansen - Tangen [1976] 1 WLR 989 ***(refd)***

Summit Investment Inc. v. British Steel Corpn. [1987] 1 Lloyd's Rep. 230 ***(refd)***
Mackenzie v. Duke of Devonshire [1896] AC 400 ***(refd)***
Exp. Dawes, re Moon [1886] 17 QBD 275 ***(refd)***
Neill v. Duke of Devonshire [1883] 8 App. Cas. 135 ***(refd)***
Houghton v. Trafalgar Insurance Co. Ltd. [1954] 1 QB 247 ***(refd)***
The Superintendent of Lands, Fourth Division, Sarawak v. Hamit Matussin & Ors. [1994] 3 MLJ 185 ***(refd)***
Pacific Asia Leasing (M) Sdn. Bhd. v. Senanti Motors Sdn. Bhd. & Anor. [1992] 2 MLJ 364 ***(foll)***
Bank Bumiputra Malaysia Bhd. v. Darnaz Enterprise Sdn. Bhd. & Ors. [1986] 2 MLJ 222 ***(refd)***
Thomas v. Nottingham Incorporated Football Club Ltd. [1972] 1 Ch 596 ***(foll)***
Hobbs v. Wayet [1887] 36 Ch. Div. 256 ***(refd)***
In re Anderson-Berry (Harris v. Griffith) [1928] 1 Ch 290 ***(refd)***
Tate v. Crewdson [1938] 1 Ch 869 ***(refd)***
Euco International Sdn. Bhd. v. P. F. Chen [1984] 2 MLJ 61 ***(dist)***
Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor. [1979] 2 MLJ 101 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 98
Rules of the High Court 1980, O. 16

Other source referred to:
Halsbury's Laws of England, Vol. 12, paras. 1459, 1460, 1469, 1471, 1485 to 1487

For the plaintiff - Christina Eng; M/s. C.J. Eng
For the plaintiff - Lau Mei Ling; M/s. Sim & Yee
For the defendants - Matthew T.K. Chan; M/s. Matthew T.K. Chan & Co.

JUDGMENT

Richard Malanjum J:

Introduction

There are two actions before me, namely, Suit No. KG. 454 of 1987 (KG. 454/87) and Suit No. KG. 186 of 1986 (KG. 186/86). They have been consolidated by an order of the Court dated 10 November 1987. In KG. 186/86, the plaintiffs have abandoned two of their claims, leaving only the following prayers, namely (and I reproduce *verbatim):*

1. A declaration that the plaintiffs be indemnified by the defendants against any claim by Bank Bumiputra Malaysia Berhad under the letter of guarantee dated 9 October 1982;
2. Further or alternatively, an order that the defendants do within 30 days from the date of the order to be made hereon set aside a fund out of which the plaintiffs' liability under the letter of guarantee dated 9 October 1982 may be met;
3. Costs including plaintiffs' advocates costs in commencing such proceedings.

Similarly, in KG. 454/87, the plaintiffs are also praying for the following reliefs, namely, (and I also reproduce *verbatim):*

1. A declaration that the plaintiff be indemnified by the defendants against any claim by Bank Bumiputra Malaysia Berhad under the letter of guarantee dated 9 October 1982;
2. Further or alternatively, an order that the defendants do within 30 days from the date of the order to be made hereon set aside a fund out of which the plaintiff's liability under the letter of guarantee dated 9 October 1982 may be met;
3. Costs including plaintiff's advocates' costs in commencing such proceedings.

In their defence to the action KG. 186/86, the defendants pleaded the following, in summary:

(a) In para. 1(b) of the amended defence dated 24 October 89 the defendants stated that they were, at all material times, and still are able and willing to indemnify the plaintiffs against all claims actions or proceedings arising out of or relating to the letter of guarantee dated 9 October 1982 (the said guarantee);

(b) that it was Bank Bumiputra Malaysia Berhad (BBMB) which refused to rescind the said guarantee even after steps were taken by the defendants;

(c) that the sale and purchase agreement dated 18 May 1983 (the said agreement) was only concerned with the sale of the shares of the plaintiffs in Metrocity Development Sdn. Bhd., (Metrocity) at the price of RM1.133 per share. Thus, upon the execution of the deeds of transfers the sale was completed;

(d) that the promises contained in clause 10 of the said agreement were gratuitous and thus unenforceable in law as there was no consideration given;

(e) that on the true construction of the said agreement only clause 10(c) therein should be applicable as between the plaintiffs and the defendants. But as clause 10(c) was in the nature of a contract of indemnity and since the plaintiffs had not incurred any liability at the date of the commencment of the action, they had no cause of action against the defendants; and

(f) that on the true construction of clause 10(c) the defendants were not obliged to arrange with BBMB so as to make the defendants responsible for the said guarantee.

For action KG. 454/87, similar defences as in KG. 186/86 were pleaded by the defendants except for two matters, namely:

(i) that there was no plea similar to para. 1(b) of the amended defence in KG. 186/86; and

(ii) that the plea of limitation was pleaded.

There was no evidence led during the hearing of these consolidated actions as the parties rested their cases and submissions on the statement of agreed facts, supplementary statement of agreed facts and the agreed bundle of documents which were admitted and marked as "A", "Al" and "Exh. A" respectively, Towards the end of the hearing, learned Counsel for the plaintiffs in KG. 186/86 tendered a valuation report and as it was not objected, it was therefore marked as "Exh. Pl". Further, as the facts and issues of both these actions are substantially the same I shall therefore consider them in coming to my decision as if they are in one case.

Statement of Agreed Facts and Supplementary Statement of Agreed Facts

As there was no witness called during the hearing it would be appropriate that I should reproduce the statement of agreed facts and the supplementary statement of agreed facts in toto.

(1) Statement of agreed facts "A":

1. Hoanbing (M) Sdn. Bhd. was and is at all material time the registered proprietor of Lots 44, 107 and 108 KTLD and Wisma Hoanbing/Bersatu was built on Lots 44, 107 and 108 KTLD.

2. By an agreement dated 1 November 1982 all the shares in Hoanbing (M) Sdn. Bhd. was bought by SS Plaza Sdn. Bhd.

3. In November 1982 Metrocity Development Sdn. Bhd. held 1,212,800 shares out of 6,063,998 allotted shares in SS Plaza Sdn. Bhd. Prior to 18 May 1983, the plaintiffs herein held all the shares in Metrocity Development Sdn. Bhd.

4. By a written agreement between the plaintiffs, as the vendors, and the defendants, as the purchasers, dated 18 May 1983 ("the agreement"), the plaintiffs sold to the defendants all their shares in the company known as Metrocity Development Sdn. Bhd. ("the said shares").

5. Clause 6 of the agreement provides as follows:

> 6. The sale and purchase shall be completed upon the execution of the deeds of transfers.

6. Clause 8 of the agreement provides as follows:

> 8. The parties hereto agree that they will execute and do and take such necessary steps as may be in their power to procure all other necessary persons or companies if any to execute and do all such further deeds assurances acts and things as may be reasonably required so that full effect may be given to the terms and conditions of this agreement

7. Clause 10 of the agreement provides as follows:

> 10. The purchasers **hereby jointly and severally undertake** that:
>
> (a) the letter of guarantee dated 9 October 1982 jointly signed by YB Haji Salleh Jafaruddin, Datuk Haji Shahbuddin Y.K. Cheng, William Lee Che Hing, Kwok Chee Loon, Yong Chon Yee, Yong Chong Yew and Stephen Hew Ngin Chong in favour of Bank Bumiputra Malaysia Berhad for the sum of Malaysia Ringgit eleven million one hundred sixty eight thousand seven hundred ninetyfive only (RM11,168,795) be rescinded by the said bank; or
>
> (b) the said Yong Chon Yee, Yong Chon Yew and Stephen Hew Ngin Chong be completely released by the said bank in respect of the said letter of guarantee dated 9 October 1982; or
>
> (c) the purchasers shall be jointly and severally responsible for the said letter of guarantee dated 9 October 1982, and that they hereby **indemnify and will keep** the **vendors indemnified** against all claims actions or proceeding arising out of or relating to the said letter of guarantee dated 9 October 1982.

8. Clause 15 of the agreement provides as follows:

> 15. The purchsers hereby jointly and severally further undertake that:
>
> (a) The said **Yong Chon Yee, Yong Chon Yew and Stephen Hew Ngin Chong** be completely released from the letter of guarantee dated l November 1982, which they have given together with YB Tuan Haji Salleh Jafaruddin, Datuk Haji Shahbuddin Y.K. Cheng, Kwok Chee Loong, William Chee Hing to the favour of Yek Siew Hieng, Yek & Sons Sdn. Bhd., Hing Pang Realty Sdn. Bhd., Hoan Siew Boon, Fan Pick Leng and Hoanbing Holdings Sdn. Bhd.; or
>
> (b) The purchasers shall be jointly and severally responsible for the said letter of guarantee dated 1 November 1982, and that they hereby **indemnify and will keep the vendors indemnified** against all claims actions or proceedings arising out of or relating to the said letter of guarantee dated l November 1982.

9. On the signing of the agreement, the defendants paid to the plaintiffs a total sum of RM340,000 as the purchase price of the said shares, and the plaintiffs transferred the said shares to the defendants.

GUARANTEE

10. On 9 October 1982, the plaintiffs and the defendant Datuk Haji Shahbuddin Y.K. Cheng, and three others executed a letter of guarantee in favour of Bank Bumiputra Malaysia Berhad ("Bank Bumi"), *inter alia*, for the sum of RM11,168,795 ("the guarantee"), as referred to in clause 10.

11. At all material times, Wisma Bersatu Sdn. Bhd. ("Wisma Bersatu"), formerly known as Hoanbing (M) Sdn. Bhd, ("Hoanbing"), was a company controlled by and acting on behalf of the defendants. Hoanbing was and is the principal debtor of Bank Bumi secured by the guarantee.

12. (a) By a letter dated the 26 April 1983, the defendants, through Hoanbing informed Bank Bumi that "henceforth" the authority of the plaintiffs herein to sign cheques on the company's behalf be cancelled and that the bank be authorised to honour cheques signed by the other directors, namely the defendants herein and 2 others.

(b) By a letter dated the 26 April 1983, the defendants, through Hoanbing, requested Bank Bumi to "arrange to have guarantees (of the plaintiffs) furnished to your bank for the facilities granted to us withdrawn forthwith".

13. By a letter dated 6 March 1984, the defendants, through Wisma Bersatu, forwarded an extract of minutes of board meeting dated 6 March 1983.

14. The extract of minutes of Hoanbing (M) Sdn. Bhd. held on 6 April 1983 was to record that:

> Following the withdrawal and participation of Messrs Yong Chon Yee and Yong Chon Yew and Steven Hew Ngin Chong in the company, it was resolved that henceforth their authority to sign cheques on the company's behalf for its account with The Chartered Bank, Kuching, be cancelled and that forthwith the bank be authorised to honour cheques signed jointly by any two of the directors one of which must be from each group as follows:

15. By a letter dated 18 October 1984, the defendants, through Wisma Bersatu, requested Bank Bumi to "arrange to have the guarantee given by (the plaintiffs) to your bank for facilities to our company withdrawn".

16. By letter dated 22 October 1984, the plaintiffs through Messrs Anthony Liew Advocate wrote to Bank Bumi informing the Bank of plaintiffs' resignation as Directors of Hoanbing (M) Sdn. Bhd., and Messrs Anthony Liew Advocate thereby sought a formal letter of discharge from the bank.

17. The plaintiffs in Messrs Anthony Liew Advocate's letter of 22 October 1984 also stated that the incoming directors were to take the place of the plaintiffs as guarantors.

18. By letter dated 10 December 1984 the plaintiffs through Messrs Anthony Liew Advocate gave notice that unless constructive steps were taken by the defendants to secure the release of the plaintiffs from the guarantee the matter would be referred to Court.

19. By letter dated 13 December 1984 the defendants conveyed their regret to the plaintiff through Wisma Bersatu in respect of their oversight in securing the release of the plaintiffs' as guarantors, to Bank Bumi.

20. By letter dated 14 January 1984, the plaintiffs through Messrs Anthony Liew Advocate requested the defendants through Wisma Bersatu Sdn. Bhd. for the outcome of the defendants' arrangements to release the plaintiffs' discharge as guarantors to Bank Bumi.

21. By a letter dated 14 January 1985, the defendants, through Wisma Bersatu, requested Bank Bumi to "arrange to have the guarantee (of the plaintiffs) furnished to your Bank for facilities granted to us, withdrawn forthwith".

22. The letter of Wisma Bersatu dated 14 January 1985 also enclosed an extract of minutes dated 20 December 1984 that resolved as follows:

> It was resolved that the former directors of the company, namely Yong Chon Yew, Yong Chon Yee and Steven Hew Ngin Chong be released from their guarantees to Bank Bumiputra Malaysia Berhad for banking facility given to the company and in lieu thereof, the remaining and new directors, Puan Aisah Zainab Mahmud and Miss Cheng Yi will furnish to the Bank a fresh guarantee for the said facility.

23. By a letter dated the 10 April 1985, Bank Bumi, *inter alia*, in reply to Wisma Bersatu's letter to them dated 10 April 1985 rejected their request to have the guarantee against the plaintiffs withdrawn.

24. By registered letter dated 6 May 1985 the plaintiffs through Messrs Anthony Liew Advocate gave 14 days notice that unless the plaintiffs are released from the bank guarantee with Bank Bumi, the plaintiffs would commence action against the defendants herein.

25. By letter dated 10 September 1985, the plaintiffs through Messrs Anthony Liew Advocate informed the defendants that further to the teleconversation with the defendants, the plaintiffs were prepared to withhold legal proceedings on condition that a collateral guarantee was furnished.

26. On 27 February 1987, Bank Bumi instituted High Court Civil Suit No. KG. 119 of 1987 (Suit KG. 119) against the plaintiffs and six others.

27. In Suit KG. 119, Bank Bumi, *inter alia* claimed against the plaintiffs and four others under the guarantee as follows:

(i) Judgment in the sum of **Malaysian Ringgit sixteen million one hundred and sixty-six thousand seven hundred and ninety-five and sen twenty-four only** (RM16,166,795.24) being outstanding balance on overdraft account as at 31 January 1987 together with interest thereon at the rate of 14.25% per annum from 1 February 1987 till the date of judgment and thereafter at the rate of 8% per annum;

(ii) Judgment in the sum of **Malaysian Ringgit six hundred and seventy-six thousand five hundred and sixty-four and sen sixty-four only** (RM676,564.64) in respect of trust receipt together with interest thereon at the rate of 16.25% per annum from l February 1987 till the date of judgment and thereafter at the rate of 8% per annum;

(iii) Judgment in the sum of **Malaysian Ringgit seventy-nine thousand three hundred and ninety and sen ninety-two only** (RM79,390.92) in respect of bill receivable together with interest thereon at the rate of 10% per annum from l February 1987 till the date of judgment and thereafter at the rate of 8% per annum;

(iv) Costs;

(v) Such further or other relief as the Court may think fit. *(sic)*

28. On 13 of September 1988, Bank Bumi discontinued Suit KG. 119 against the plaintiffs and the other defendants therein further to an application by the defendants to strike out the bank's claim.

29. Bank Bumi did not enter any judgment against the plaintiffs in Suit KG. 119.

30. The plaintiffs did not make any payment to Bank Bumi towards the claims in Suit KG. 119.

Suit Kg. 79 of 1991

31. On 16 July 1991 Bank Bumi instituted High Court Suit No. KG. 79 of 1991 (Suit KG. 79) against the plaintiff, Steven Hew Ngin Chong.

32. In Suit KG. 79, Bank Bumi claims against the plaintiffs, Steven Hew Ngin Chong, under the guarantee, as follows:

(i) Judgment in the sum of **Malaysian Ringgit eighteen million three hundred and thirteen thousand eight hundred and twenty-three and sen two only** (RM18,313,823.02) being the outstanding balance on overdraft account as at 31 December 1987 together with interest thereon at the rate of 14.25% per annum from 1 January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(ii) Judgment in the sum of **Malaysian Ringgit seven hundred and twenty-nine thousand nine hundred and seventy and sen sixty-two only** (RM729,970.62) in respect of trust receipts together with interest thereon at the rate of 16.25% per annum from 1 January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(iii) Judgment in the sum of **Malaysian Ringgit forty-eight thousand nine hundred and seventy-seven and sen seventy-eight only** (RM48,977.78) in respect of bill receivable together with interest thereon at the rate of 10% per annum from l January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(iv) Costs;

(v) Such further or other relief as the Court may think fit.

33. The plaintiff, Steven Hew Ngin Chong, entered a defence and counterclaim in Suit KG. 79, in which he counterclaims against Bank Bumi as follows:

(a) a declaration that he is discharged from all liability *(sic)* under the said guarantee;

(b) Costs.

34. Suit KG. 79 is awaiting for a date for trial to be fixed by the Court.

35. The plaintiff, Steven Hew Ngin Chong, has not made *(sic)* any payment to Bank Bumi towards the claims in Suit KG. 79.

Suit Kg. 19 of 1991

36. On 30 January 1991, Bank Bumi instituted High Court Civil Suit No. KG. 19 of 1991 (Suit KG. 19) against the plaintiff, Yong Chon Yee.

37. In Suit KG. 19, Bank Bumi claims against the plaintiff, Yong Chon Yee, under the guarantee, as follows:

(i) Judgment in the sum of **Malaysian Ringgit eighteen million three hundred and thirteen thousand eight hundred and twenty-three and sen two only** (RM18,313,823.02) being outstanding balance on overdraft account as at 31 December 1987, together with interest thereon at the rate of 14.25% per annum from l January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(ii) Judgment in the sum of **Malaysian Ringgit seven hundred and twenty nine thousand nine hundred and seventy and sen sixty two only** (RM729,970.62) in respect of trust receipts together with interest thereon at the rate of 16.25% per annum from 1 January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(iii) Judgment in the sum at **Malaysian Ringgit forty eight thousand nine hundred and seventy seven and sen seventy-eight only** (RM48,977.78) in respect of bill receivable together with interest thereon at the rate of 10% per annum from l January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

(iv) Costs; and

(v) Such further or other relief as the Court may think fit.

38. On 26 December 1991, the plaintiff, Yong Chon Yee, entered a defence and counterclaim in Suit KG. 19 in which he counterclaims against Bank Bumi as follows:

    (a) A declaration that he is discharged from all liabilities under the said guarantee; and

    (b) Costs.

39. On 3 January 1992, Bank Bumi delivered a reply to defence and defence to counterclaim.

40. Suit KG. 19 is a waiting a date for trial to be fixed by the Court.

41. The plaintiff, Yong Chon Yee, has not make *(sic)* any payment to Bank Bumi towards the claims in Suit KG. 19.

(ii) Supplementary statement of agreed facts "A1":

Suit KG. 80 of 1991

42. On 16 July 1991, Bank Bumi instituted High Court Civil Suit No. KG. 80 of 1991 (Suit KG. 80) against the plaintiff, Yong Chon Yew.

43. In Suit KG. 80 Bank Bumi claims against the plaintiff, Yong Chon Yew, under the guarantee, as follows:

    (i) Judgment in the sum of **Malaysian Ringgit eighteen million three hundred and thirteen thousand eight hundred and twenty-three and sen two only** (RM18,313,823.02) being the outstanding balance on overdraft account as at 31 December 1987 together with interest thereon at the rate of 14,25% per annum from l January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

    (ii) Judgment in the sum of **Malaysian Ringgit seven hundred and twenty-nine thousand nine hundred and seventy and sen sixty-two only** (RM729,970.62) in respect of trust receipts together with interest thereon at the rate of 16.25% per annum from 1 January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

    (iii) Judgment in the sum of **Malaysian Ringgit forty-eight thousand nine hundred and seventy-seven and sen seventy-eight only** (RM48,977.78) in respect of bill receivable together with interest thereon at the rate of 10% per annum from 1 January 1988 till the date of judgment and thereafter at the rate of 8% per annum;

    (iv) Costs;

    (v) Such further or other relief as the Court may think fit.

44. The plaintiff, Yong Chon Yew, entered a defence and counterclaim in Suit KG. 80, in which he counterclaims against Bank Bumi as follows:

    (a) a declaration that he is discharged from all liability *(sic)* under the said guarantee;

    (b) costs.

45. Suit KG. 80 is awaiting for a date for trial to be fixed by the Court.

46. The plaintiff, Yong Chon Yew, has not make *(sic)* any payment to Bank Bumi towards the claims in Suit KG. 80.

The Issues

Having heard the submissions of the learned Counsel for the respective parties I am inclined to agree with the Counsel for the plaintiffs in KG. 186/86 (Ms. Eng) that the primary issues to be determined should be:

(i) whether the agreement by the defendants to indemnify the plaintiffs against any claim by BBMB was supported by consideration; and

(ii) that if the plaintiffs are entitled to be indemnified, whether they are entitled at this stage to the declaration prayed for.

Learned Counsel for the defendants (Mr. Chan) added two other issues, which I consider to be secondary, in his submissions *viz*:

(a) that the non-joinder of the fourth vendor, Poh Lik Gan, in the action should bar the plaintiffs in law from succeeding in their claims;

(b) that the combined effect of clauses 6 and 8 of the said agreement and the absence of any provision for the continuing enforceability of the unperformed terms, discharged the defendants of their obligations under clause 10 of the said agreement; and

(c) that the plaintiffs have no cause of action.

Findings

(1) On primary issue (i) - whether the agreement by the defendants to indemnify the plaintiffs against any claim by BBMB was supported by consideration

Now, having heard and considered the submissions of all the learned Counsel it is obvious that some of the clauses in the said agreement require detailed examination. For convenience I reproduce herewith those clauses which were given emphasis by the learned Counsel, namely:

Recital 3: The vendors have agreed to sell and the purchasers have agreed to purchase the said shares at the purchase price and upon and subject to the terms and conditions as hereinafter provided.

Clause 4: The consideration for the said shares shall be Ringgit three hundred and forty thousand only ($340,000) which is approximately $1.133 per share and shall be paid by the purchasers to the vendors upon execution of the deed of transfers which shall be simultaneously executed with the signing hereof and the vendors shall hand over their respective duly executed deed of transfers in favour of the purchasers together with the relevant share certificates.

Clause 6: The sale and purchase shall be completed upon the execution of the deeds of transfer.

Clause 8: The parties hereto agree that they will execute and do and take such necessary steps as may be in their power to procure all other necessary persons or companies if any, to execute and do all such further deeds assurances acts and things as may be reasonably required so that full effect may be given to the terms and conditions of this agreement.

Clause 10: The purchasers hereby jointly and severally undertake that:

a) the letter of guarantee dated 9 October 1982, jointly signed by YB Haji Salleh Jafaruddin, Datuk Haji Shahbuddin Y.K. Cheng, William Lee Che Hing, Kwok Chee Loong, Yong Chon Yee, Yong Chon Yew and Stephen Hew Ngin Chong in favour of Bank Bumiputra Malaysia Berhad to the sum of Malaysian Ringgit eleven million one hundred sixty-eight thousand seven hundred and ninety-five only (RM11,168,795) be rescinded by the said bank; or

b) the said Yong Chon Yee, Yong Chon Yew and Stephen Hew Ngin Chong be completely released by the said bank in respect of the said letter of guarantee dated 9 October 1982; or

c) the purchasers shall be jointly and severally responsible for the said letter of

guarantee dated 9 October 1982, and that they hereby **indemnify and will keep the vendors indemnified** against all claims actions or proceeding arising out of or relating to the said letter of guarantee dated 9 October 1982.

(a) Contentions of the plaintiffs

Learned Counsel, Ms. Eng, has submitted that the undertaking to indemnify given by the defendants is supported by consideration as the sales of the shares involved the payment of cash and the obligations under clause 10 of the said agreement. Learned Counsel argued that the indemnity provision should be read as part and parcel of the sales of the shares. And she cited *Halsbury's Laws of England*, Vol. 12 paras. 1459, 1460 ,1469, 1471, 1485 - 1487 which in summary, state as follows:

(i) that the real intention of the parties must be discovered in interpreting the terms of an instrument;

(ii) that the intention can be gathered by reading the document in the light of extrinsic evidence admissible for the purpose of construction;

(iii) that if the intention of the parties can be ascertained from the written instrument, the intention must be given effect notwithstanding ambiguities in the words used or defects in the operation of the instrument;

(iv) that an instrument must be construed as a whole in order to ascertain the true meanings of the clauses in question so as to be harmonious with the other provisions of the instrument; and

(v) that extrinsic evidence is to be admitted to show the consideration in a transaction or to show the nature of the transaction or the true relationship of the parties.

Hence, Ms. Eng submitted that in order to find out the true intention of the parties in the instant case, firstly, the entire said agreement must be looked at and secondly, the surrounding circumstances must be considered.

Learned Counsel said that on reading the said agreement as a whole clause 10 and the recital 3 neutralized the effects of clause 4 and 6 read on their own.

As for the surrounding circumstances, Ms. Eng submitted that Metrocity held 1/6 of the shares in SS Plaza which was the controlling company of Hoanbing/Wisma Bersatu. And Hoanbing/Wisma Bersatu owned the lands which should be worth at least RM11 million when the said guarantee was given since the said lands were also charged as securities for the loan. Hence, through the process of deduction, learned Counsel said that the worth of the asset of Metrocity at the material time (through SS Plaza) should be at least RM1.8 million. And she opined that to say that the shares are only worth RM340,000 would be selling them for a song.

It was also contended that the purpose of the loan from BBMB was for the construction of Wisma Hoanbing/Wisma Bersatu and the said guarantee was given for that loan. Upon the sales of the plaintiffs' shares it would amount to giving up their interest in Wisma Bersatu. Thus, it would not be logical for the plaintiffs to remain as guarantors for the loan. As such, clause 10 should therefore be construed as part of the said agreement read as a whole.

Finally, the rule of *contra proferentem* was referred to. Learned Counsel said that in construing clause 10 it should be in favour of the plaintiffs and against the defendants as they were and are the obligors.

Ms. Lau Mei Ling (Ms. Lau), learned Counsel for the plaintiff in KG. 454/87, supported the submissions of Ms. Eng. In addition, Ms. Lau contended that consideration was given when the plaintiffs executed the deeds of transfer. On the refusal of BBMB to discharge the said guarantee, Ms. Lau placed the reason on the failure of the borrower to pay up the default account. And as for the defence that there was no obligation under clause 10(c), learned Counsel referred to the several letters written by the defendants to BBMB and said that they should not be now heard denying their obligations. The fact that the plaintiff had resigned as a director from Metrocity and SS Plaza was also pointed out.

(b) Contentions of the defendants

Mr. Matthew Chan, learned Counsel for the defendants, submitted that there was no consideration to support clause 10 for the following reasons, in summary:

(i) the guarantee in clause 10 was not in respect of any indebtedness of Metrocity to BBMB;

(ii) Clause 10 only affected the plaintiffs and not the fourth vendor, Poh Lik Gan;

(iii) Clause 10 is on its own and without any default provision;

(iv) that the reason for the discharge of the said guarantee was to remove as an obstacle in the borrowing capacity of the plaintiffs and not due to clause 10 of the said agreement; and

(v) that the said agreement could be divided into two contracts, firstly, on the sale and purchase of the shares and secondly, clauses 10 and 15 which were without consideration.

(c) Findings

It is a rule of construction that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. Hence, an individual word takes its meaning from the context in which it is found and an individual clause takes its meaning from the context of the document in which it is found. (See: *Chamber Colliery Ltd. v. Twyerould* [1915] 1 Ch 268). This rule had been applied in our Courts. (See*: Trengganu State Economic Development Corpn. v Nadefinco Ltd.* [1982] 1 MLJ 365 FC and in *City Investment Sdn. Bhd. v. Koperasi Serbaguna Cuepacs Tanggungan Bhd.* [1985] 1 MLJ 285 FC).

And that it is also a rule of construction that in interpreting a contract the mutual intention of the contracting parties should be ascertained in the sense of what would have been the intention of hypothetical reasonable parties, placed in the same situation as the contracting parties, and contracting in the words used by the actual parties. In *Reardon - Smith Line Ltd. v. Hansen - Tangen* [1976] 1 WLR 989 at p. 996 E-F Lord Wilberforce said:

> When one speaks of the intention of the parties to the contract one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

And in *Summit Investment Inc. v British Steel Corpn.* [1987] 1 Lloyd's Rep. 230 at p. 233, Sir John Donaldson MR went to the extent of saying that as between the contracting parties:

> their actual intentions are happily irrelevant, since, were it otherwise, many, and perhaps most, disputes upon points of construction would be resolved by holding that the parties were not *ad idem*.

Thus, in interpreting a contract the approach to be taken in ascertaining the intention of the parties is an objective one.

Now, on this primary issue (i) the debate centered on the construction of the said agreement, in particular, clause 10. The defendants contended that in the nature of the provisions of the said agreement clause 10 could not be said to have been supported by any consideration. Basically, the defendants said that the said agreement should be read in two parts. And the first part had been completed by the transfer of the shares of the plaintiffs in Metrocity to the defendants. Whereas the second part involves clause 10, which standing on its own without any consideration or any continuing enforceability clause or default provision, could no longer be enforced.

With respect, I find it difficult to agree with the arguments of the defendants bearing in mind the rules of construing instruments or contracts as discussed hereinabove. Judged objectively, there is no reason to conclude that the said agreement should be construed in two parts. If that had been the intention of the parties then there would have been no necessity to include clause 10 in the said agreement since, as submitted by the learned Counsel for the defendants, that as early as 26 April 1983 the defendants had already written to BBMB to have the said guarantee withdrawn. That course of action would have been continued if the defendants expected to act gratuitously. Further, I am inclined to agree with the submission of the learned Counsel for the plaintiffs (Ms. Eng) in respect of the effect of recital 3. No doubt in *Mackenzie v. Duke of Devonshire* [1896] AC 400 at p. 408, Lord Davey said:

> I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and ambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention.

But if the operative part of the document is unclear, then recitals may be relied upon as an aid to construction. In *Exp. Dawes, re Moon* [1886] 170. BD 275 at p. 286 Lord Esher MR said:

> If the recitals are clear and the operative part is ambiguous, recitals govern the construction.

In the instant case, the defendants argued that clause 10 stood on its own. In view of that argument I think recital 3 should therefore be considered. And it is plain in that recital that the intention of the parties when entering into the transaction involved not only the payment of the purchase price for the shares but **'upon and subject to the terms and conditions as hereinafter provided'**. (Emphasis added). And I have no doubt that clause 10 is a term or condition in the said agreement. Hence, taking into account recital 3, it becomes clear that clause 10 is part and parcel of the said agreement read as a whole.

For the foregoing reason alone I agree that there is no merit in the contention that clause 10 is unsupported by any consideration. And should it be necessary to fortify my conclusion I would further agree with the learned Counsel for the plaintiffs (Ms. Eng) that the surrounding circumstances should be considered as well.

Firstly, there is no dispute that the plaintiffs had relinquished their positions in Metrocity. And by so doing it could be said that they had no longer anything to do with the purpose of the loan from BBMB. Thus, in such a situation it could not reasonably be held that the plaintiffs would agree to continue to be bound by the said guarantee for no apparent reason. Obviously therefore clause 10 of the said agreement was intended to rectify the situation along with the sales of shares.

Secondly, the letters written by the defendants, through Wisma Bersatu Sdn. Bhd., to BBMB (pp. 38, 39, 40, and 47 of "Ex .A") and the minutes (p. 48 of "Exh. A") did not indicate in any way that the conduct of the defendants could be construed as one of gratuitous nature. Learned Counsel for the defendants construed the purpose and the effect of the word "arrangement" in the letter dated 22 October 1984 from Anthony Liew Advocates to BBMB (p. 41 of "Exh. A") to substantiate his argument that the said agreement could not be linked to the withdrawal of the said guarantee. But the letter of the same advocates dated 10 December 1984 to the defendants (p. 43 of "Exh. A") and their reply dated 13 December 1984 (p. 45 of "Exh. A") had demolished that argument. There was no explanation for the absence of any denial to the averments in the letter of 10 December 1984.

In respect of the rule of *contra proferentem* submitted by Ms. Eng I am also with her on that point. In *Neill v. Duke of Devonshire* [1883] 8 App Cas. 135 at p. 149 - Lord Selbourne LC said:

> It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee.

And in *Houghton v. Trafalgar Insurance Co. Ltd.* [1954] 1 QB 247 at p. 249 - Somervell LJ said:

> If there is any ambiguity, since it is the defendants clause, the ambiguity will be resolved in favour of the assured.

In the instant case, clause 10 of the said agreement is in favour of the plaintiffs. Applying therefore the aforementioned rule the inevitable conclusion is that the defendants should be bound by it.

For this primary issue (i) I find therefore in the affirmative for the plaintiffs. I have also considered the other arguments of the learned Counsel for the parties but in view of my conclusion I do not think it is necessary to deal with them in any detail. Suffice it to say that the defendants seem to have ignored the effect of their plea in para. 1(b) of the amended defence for KG. 186/86.

(2) Other secondary issues raised by the defendants

Before going into the primary issue (ii) I should deal first with the other issues raised by the defendants as they have bearing to the outcome on issue (ii) should any of those other issues falls in favour of the defendants.

Firstly, learned Counsel for the defendants submitted that the non-joinder of the fourth vendor Poh Lik Gan in the actions should bar the plaintiffs from succeeding in their claims. With respect, this issue was not pleaded by the defendants in their defence and as such I should not consider it. This issue, in my view, is a departure from the lines of defence taken by the defendants in their pleadings. (See: *The Superintendent of Lands, Fourth Division, Sarawak v. Hamit Matussin & Ors.* [1994] 3 MLJ - 185). It is also surprising that the defendants did not take this issue as a preliminary point if they were serious about it or that they were prejudiced in any way by the non-joinder. There was no complaint of any prejudice.

In any event, the issue is a *non-sequitur*. I find the fourth vendor to be an unnecessary party. His non-joinder should not defeat the actions and it is therefore not obligatory for me to order his inclusion. Obviously it would have been an unwarranted extra costs to include the fourth vendor as he had no interest in the discharge of the said guarantee. He was not one of the guarantors.

Secondly, it was argued that the combined effect of clauses 6 and 8 of the said agreement and the absence of a provision for the continuing enforceability of the unperformed terms should discharge the defendants of their obligations under clause 10 thereof. Learned Counsel (Mr. Chan) submitted that after attempts to have the said guarantee discharged and with BBMB refusing, the defendants had done their parts under clause 8 which was a best endeavour clause. In view of my finding on primary issue (i) above, I do not think this foregoing argument leads to anywhere. As the said agreement should be read and construed as a whole there is no necessity to insist for a continuing enforceability clause. I find that to do so would be assuming that a completion date of the said agreement had taken place. But that should not be so if it is to be read as a whole.

Additionally, I do not think clauses 6 and 8 should be read so as to alienate the effect of clause 10. To my mind, clauses 8 and 10 should be construed as complimentary to each other with the latter clause providing the obligations of the defendants.

Thirdly, the defendants contended that the plaintiffs had no cause of action. And I will combine the reasons given although submitted separately. First reason given was that the new actions of BBMB were not pleaded in the statement of claims. The second reason was that the plaintiffs had not made any payments to BBMB in respect of the said guarantee.

Having read the amended statement of claims of the plaintiffs I find no merit in the first reason. The claim of the plaintiffs extended to any claim from BBMB and I am inclined to agree with the learned Counsel for the plaintiffs that that should include the fresh actions of BBMB. It is to be noted as well that so long as the said guarantee has not been discharged the plaintiffs remain exposed to the liability stated therein and in view of clause 10 of the said agreement it cannot be said that they do not have any cause of action against the defendants. That should also answer the second reason given.

And to conclude on the subject I should add that, with respect, I tend to agree with the reasoning given by his Lordship Shanker J (as he then was) in *Pacific Asia Leasing (M) Sdn. Bhd. v. Senanti Motors Sdn. Bhd. & Anor.* [1992] 2 MLJ 364 when he refused to follow *Bank Bumiputra Malaysia Bhd. v. Darnaz Enterprise Sdn. Bhd. & Ors.* [1986] 2 MLJ 222. No doubt in that case his Lordship was dealing with a co-surety. But in view of clause 10 of the said agreement in the present case I think the same principle should apply.

Lastly, on the issue of limitation as pleaded in para. 14 of the defence of the defendants in KG. 454/87, it seems that this issue has been forgotten by learned Counsel for the defendants in his submissions. But then again that plea was based on the assumption that clause 6 of the said agreement should be given the interpretation as submitted by the defendants. In view of my conclusion on primary issue (i) above I think the plea of limitation has lost its sting, if any, in the first place.

(3) Primary Issue (ii): That if the plaintiffs are entitled to be indemnified, whether they are at this stage entitled to the declaration prayed for.

(a) Plaintiffs' contentions

On this issue it is the contention of the learned Counsel for the plaintiffs in both actions that the plaintiffs are entitled to the declaratory order prayed for although they have not made any payment under the said guarantee. And the reasons given are as follows, in summary:

(i) that in respect of KG. 186/86 the defendants did not dispute that they had agreed to indemnify the plaintiffs;

(ii) that the defendants are contesting these actions on the basis that the undertaking to indemnify (clause 10) was without any consideration. However, if the said agreement is read as a whole then the argument has no merit;

(iii) that in equity the plaintiffs are entitled to the relief prayed for even though they have not paid anything under the said guarantee to BBMB;

(iv) that at the very least the plaintiffs are entitled to relief in view of the prospect that the defendants may not want to honour their obligations; and:

(v) that s. 98 of the Contracts Act 1950 is applicable in this instant case.

(b) Defendants' contentions

Learned Counsel for the defendants submitted that this Court should not exercise its discretionary power to grant the declaratory order prayed for. The reasons given are as follows, in summary:

(i) that the exact amount payable to BBMB is undetermined;

(ii) that cl.10(c) refers to a figure whilst the two pending suits of BBMB state a different sum;

(iii) that the plaintiffs have not made any payment under the said guarantee;

(iv) that the plaintiffs are counterclaiming in the two suits of BBMB, seeking for a declaration that they are discharged from the said guarantee;

(v) that the two suits have not been pleaded in the present actions;

(vi) that any declaratory order made will inconvenience and embarrass the defendants since the two suits are yet to be tried; and

(vii) that the fourth vendor, Poh Lik Gan, was not a party to these actions.

(c) Findings

While dealing with the secondary issues earlier on in this judgment I have already touched on the points raised in items (v) and (vii) of the defendants' contentions. As such I do not intend to deal with them again.

In respect of items (i) and (ii) of the defendants' contentions, they have also been dealt with when I was considering the secondary issue of no cause of action hereinabove. Anyway, perhaps it may be harmless if I were to repeat that the plaintiffs are praying for a declaration that they be indemnified by the defendants should there be any claim by BBMB against them under the said guarantee. Thus, I do not see how the issue of undetermined figure can help the defendants to resist the prayer of the plaintiffs. In the case of *Thomas v. Nottingham Incorporated Football Club Ltd.* [1972] 1 Ch 596, Goff J at p. 600G said:

> It is common ground that the liability is fixed, accrued and ascertainable; and if the guarantor is other-wise right, the uncertainty at this precise moment as to the true figure is irrelevant.

Similarly, in the present case there was no dispute that the mode of calculating the outstanding sum under the loan with BBMB had been stipulated. Surely the defendants should be in the better positions to know as there was no averment that they had relinquished their interests in Wisma Bersatu.

As for items (iv) and (vi) of the defendants' contentions, it is far-fetched to say that the counterclaims of the plaintiffs in the two suits should prevent this Court from entertaining the prayer of the plaintiffs for a declaration. In the event that after I have granted the prayer the plaintiffs succeed in their counterclaims, it should not prejudice or embarrass the defendants in anyway. Whereas if I refuse and the plaintiffs fail in their counterclaims, they will be put in a very precarious position. It will require time to get the defendants to agree or to be ordered to indemnify them. Meanwhile, I do not think BBMB is obliged to wait until the plaintiffs and the defendants have sorted out their differences in order to execute any judgment it may have obtained against the plaintiffs.

And as for item (iii) of the defendants' contentions, I have made a brief remark on this point earlier on in this judgment. But in view of the emphasis put on it I should therefore deal with it in greater detail.

Learned Counsel for the plaintiffs cited the case of *Thomas v. Nottingham Incorporated Football Club Ltd. (supra)* as the authority which this Court should follow.

In that case the plaintiff was a director and a guarantor to the defendant company in connection with the latter's loan (overdraft) with its banker. It was a term in the guarantee that the plaintiff's liability would arise on demand upon him by the banker for all the moneys and liabilities therein. And the guarantee was to continue upon the plaintiff and his personal representatives until the bank received a notice to the contrary from him or them. The plaintiff retired as a director of the defendant company and served a notice in writing on the bank determining his guarantee and the bank closed the account associated with the guarantee.

Subsequently, the plaintiff took an action claiming for a declaration that he was entitled to be discharged and exonerated from all liabilities under the guarantee and for that purpose the defendant should pay off outstanding debt with the bank. The Court of the first instance, Goff J held (and I quote) at p. 606F that:

> **... as a general principle in my judgment, once the account is closed and there is an accrued fixed liability, the surety is entitled to this *quia timet* relief**, whether the case be one in which no demand was required to be made or one in which it was and a demand has been made, or one in which it was and no demand has been made. (Emphasis added)

Earlier on in the judgment the learned Judge said, at p. 606B-D:

> Now, such being the state of the authorities, there is, as I see it, no concluded decision upon the question whether there is any difference between the case where it is unnecessary to give a demand, or a demand has been made, on the one hand, and the case where a demand is required and not given, on the other; and, in my judgment, that is not a valid distinction. It seems to me clearly contrary to the general principle upon which the *Ascherson* case [1909] 2 Ch 401 was decided, a principle which had been noted in ancient cases before that. **The principle is that the surety is entitled to remove the cloud which is hanging over him**. It would be strange indeed, as it seems to me, if he can do that where no demand is required, notwithstanding there is no present likelihood of any attempt to recover against him, and yet when his liability arises as between himself and the creditor only upon demand, he cannot seek to remove the cloud until it has started to rain, especially as the provision in the contract of suretyship that the creditor must make a demand upon the surety is clearly a provision for the benefit of the surety. It would be odd, I think, if that provision served as between himself and the principal debtor to put himself in a much worse position than that in which he would stand if it was not there. (Emphasis added)

Learned Counsel for the defendants argued that the aforementioned case should not be followed. He reasoned that in *Thomas's* case (*supra*) it was on a demand guarantee. Whereas in the present case it is on indemnity. But learned Counsel did not go any further to explain

as to why there should be a distinction in the approach on this particular issue as between a guarantee and an indemnity. He was satisfied to say that the crucial point in the end would be the interpretation of the indemnity provison. And I think he took the proper option. In going into the earlier line of argument learned Counsel was obviously having in mind the decision of his Lordship Gunn Chit Tuan J (as he then was) in the case of *Bank Bumiputra Malaysia Berhad v. Darnaz Enterprise Sdn. Bhd. & Ors.(supra)*.

But as I have stated earlier that I am in favour of the reasoning given by his Lordship Shanker J, (as he then was) in *Pacific Asia Leasing (M) Sdn. Bhd. v. Senanti Motors Sdn. Bhd. (supra)*. Briefly, the plaintiff in that case entered into an equipment lease agreement with the first defendant (Senanti) in respect of a bull-dozer. At that time the second defendant and the third party were directors of the first defendant. Both signed a guarantee and indemnity annexed to the lease agreement. The third party was also a director of the plaintiff at all material times.

Owing to the default of the first defendant under the lease agreement the plaintiff commenced an action to recover the unpaid rentals for the entire duration of the lease agreement. But only the first and second defendant were sued. Accordingly, the second defendant issued a third party party notice and served on the third party. The third party applied to have the third party notice set aside and to have the purported statement of claim filed by the second defendant struck out. The application was dismissed. This was what the learned Judge said at p. 368D:

> The suggestion is that a surety is therefore not entitled to commence third party proceedings against his co-surety until he has first paid more than his portion of the debt due to the principal creditor. With respect I am unable to agree.

Further down the judgment his Lordship continued:

> ... The second defendant here was claiming a contribution in the event that the Court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallized at that point and the mutual obligations of the parties should be resolved immediately at that stage.

Incidentally, in these two local cases I did not find any indication that in coming to their respective decisions, their Lordships had ruled out indemnity. In fact in the *Pacific Asia Leasing's* case *(supra)* it was the contention of third party that the second defendant was not entitled to make him (third party) an indemnifier or contributor without first settling fully all the outstanding sums due to the plaintiff. That contention was of course not entertained.

It may also be noted that in *Pacific Asia Leasing's* case (*supr*a) a specific provision of the Rules of the High Court 1980 (O. 16) was relied upon. Whereas in the present case clause 10 of the said agreement is the basis. However, save for that difference I find the circumstances prevailing in both cases to be quite similar. And in fact the plaintiffs in the present case are in more disadvantageous position. Thus, in my view the principle of law adopted in *Pacific Asia Leasing's* case and in *Thomas's* case *(supra)* should be applicable to the instant case, To my mind the principle therein should be applicable irrespective of whether it is on guarantee or indemnity. Indeed, in the present case the principle should be applied in earnest. The plaintiffs, though once guarantors to the loan of Wisma Bersatu with BBMB, are no longer having any interest, directly or indirectly, in Wisma Bersatu. And there is no dispute on that. To say therefore that the plaintiffs should pay first the outstanding debts under the said guarantee before their cause of action accrues would entail double losses to them. Firstly, they had given up their interests in the object of the loan which they guaranteed. Secondly,

they would have to come out with their money first before they could seek any relief from the defendants who had taken over their interests. Surely, that would be inequitable, unfair and unjust.

Several cases were also cited by the learned Counsel for the plaintiffs (Ms. Eng) which expounded similar principle of law aforementioned and in particular the application of the doctrine of *quia timet* in such circumstances. (See*: Hobbs v. Wayet* [1887] 36 Ch Div 256; In *re Anderson-Berry (Harris v. Griffith)* [1928] 1 Ch 290) and *Tate v. Crewdson* [1938] 1 Ch 869)

Faced with these authorities expositioning substantially the same principle the defendants would surely find it difficult to defend their stand as expressed in item (iii) above. Accordingly, to conclude it may be appropriate to quote what his Lordship Shanker J (as he then was) said in *Pacific Leasing's case* (*supra*) at p. 368:

> To put it another way, the surety in my view is entitled to enforce his potential right to contribution even before he has paid anything. He can obtain a prospective order directing the co-surety on payment of his own share to indemnify him against any further liability ...

The case of *Euco International Sdn. Bhd. v. P.F. Chen* [1984] 2 MLJ 61 FC was cited for the defendants. But I do not think that case is relevant to the facts of the present case. In that case it was a question of whether the appellant agreed to indemnify the respondent. And the question of whether the respondent could ask for indemnity even before he made any payment to the bank was not an issue before the Federal Court. There is therefore no merit in item (iii) of the defendants' contentions in so far as this present case is concerned.

Conclusion

In view of my findings hereinabove, in particular, on the primary issues (i) and (ii), I should therefore, in the exercise of my discretion, grant the declaration in terms prayed for by the plaintiffs in their respective statement of claims. In my judgment they are justified to come to Court, *quia timet*, for protection. Of course it is another question if the plaintiffs are finally adjudged not liable under the said guarantee. In granting the declaratory order I have also taken into account not only its utility and usefulness but the possible embarrassment and inconvenience to the defendants as well. In my judgment on the facts and evidence disclosed in this case the utility and usefulness outweigh the embarrassment and inconvenience, if any. (See: *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor*. [1979] 2 MLJ 101).

It is also a further or an alternative prayer of the plaintiffs that a fund should be set aside in order to meet their liabilities under the said guarantee. It was submitted that such an order should be made in view of the amount involved. And that the sum is increasing by the day. It was also suggested that the money could be put in a term/fixed deposit and to be refunded to the defendants if in the end no liabilities could be attached to the plaintiffs in relation to the said guarantee.

I have pondered over this prayer and in my judgment I should not grant it. To do so would tantamount to putting the defendants under execution proceeding when the plaintiffs themselves are not. That will not be fair or equitable in the circumstances. Furthermore, the plaintiffs requested for a fund equivalent to their liabilities under the said guarantee. But in doing so the plaintiffs did not take into account the existence of other securities given for the loan with BBMB. Hence, to compel the defendants to come up with a sum which will definitely be more than RM11 million, may mean that the defendants are being made to pay more than the amount which the plaintiffs may be liable at the end of the day. Again, in my

judgment that is not just and reasonable. If judgments have been actually obtained against the plaintiffs then perhaps this further or alternative order prayed for may be appropriate. I therefore refuse to grant the further or alternative order sought for by the plaintiffs.

In the exercise of my discretion I also award costs to the plaintiffs in both actions to be taxed.